Nos. 00-1531 and 00-1711

In the Supreme Court of the United States

VERIZON MARYLAND INC., PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL REPLY BRIEF FOR THE UNITED STATES

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I. THE TEXT, STRUCTURE, AND PURPOSE OF THE 1996 ACT COMPEL THE CONCLUSION THAT SECTION 252(e)(6) ENCOMPASSES FEDERAL COURT REVIEW OF STATE COMMISSION DECISIONS CONSTRUING AND ENFORCING INTERCONNECTION AGREEMENTS

Respondent Public Service Commission of Maryland (MPSC) does not dispute that interconnection agreements entered into pursuant to the 1996 Act are instruments of federal regulatory policy designed by Con-

gress to effectuate the development of competition in local telecommunications markets. See U.S. Supp. Br. 7-8. MPSC likewise does not dispute that state commissions could not enforce the federal rights and obligations of parties to such agreements without authority from Congress and that the source of such authority is Section 252. See *id.* at 8. Moreover, MPSC's own decision in this case reflects its understanding that state commissions, in resolving disputes between carriers about the construction and enforcement of such agreements, are governed by the substantive requirement set forth in Section 252 (and, by reference, Section 251 and the FCC's implementing rules). See Verizon Pet. App. 97a-100a; see also U.S. Supp. Br. 9. It necessarily follows that a state commission acts "under" —that is, by "authority of" and "subject to"—Section 252 when it construes and enforces an agreement. *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991). Thus, contrary to MPSC's assertion (Br. 3), such decisions are reviewable in federal court under "the explicit language of § 252(e)(6)," which encompasses "*any* case in which a State commission makes a determination *under* [Section 252]," not merely cases approving or rejecting agreements in the first instance. 47 U.S.C. 252(e)(6) (emphases added).[1]

Nor is MPSC correct in suggesting (Supp. Br. 3-4) that Section 252(e)(6)'s description of the scope of

[1] That conclusion comports with the standard articulated in *Stone* v. *INS*, 514 U.S. 386, 405 (1995), on which MPSC purports to rely (Supp. Br. 3), that jurisdictional statutes "must be construed with strict fidelity to their terms." In *Stone*, the Court applied ordinary rules of statutory construction, including consideration of the structure and purpose of the statute, to ascertain what Congress meant by terms that were not clear on their face. See 514 U.S. at 390-405.

federal judicial review—"to determine whether the agreement or statement meets the requirements of section[s] 251 and [252]"—confines such review to "decision[s] approving or rejecting an interconnection agreement." An agreement must satisfy Sections 251 and 252 not only at its inception, but also throughout its term, as disputes about its meaning arise between the parties and are resolved by the state commission. And, in reviewing state commission determinations at both the approval and enforcement stages, the federal court must ascertain whether the agreement, as construed by the state commission, meets the requirements of Sections 251 and 252.

MPSC's reading of Section 252(e)(6) is rendered even more untenable by Section 252(e)(4), which explicitly singles out state commission decisions "approving or rejecting an agreement" for exclusive federal court review. 47 U.S.C. 252(e)(4). Congress did not use similarly restrictive language in describing the scope of federal court review under Section 252(e)(6). "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *City of Chicago* v. *Environmental Def. Fund*, 511 U.S. 328, 338 (1994) (internal quotation marks omitted).

Curiously, MPSC asserts (Supp. Br. 4-5) that its position "is buttressed by § 252(e)(4)," because "Congress * * * chose to prohibit [state court] review only as to State commission decisions 'approving or rejecting' interconnection agreements." But the fact that Congress did not expressly prohibit *state court review* of state commission decisions with respect to existing agreements offers no support for MPSC's contention that Congress thereby impliedly prohibited *federal court review* of such decisions. The ordinary under-

standing, when Congress has not provided otherwise, is that federal and state courts exercise concurrent jurisdiction over cases arising under federal law. See *Tafflin* v. *Levitt*, 493 U.S. 455, 463 (1990) ("legislative silence counsels, if not compels, us to enforce the presumption of concurrent jurisdiction").

MPSC offers no plausible reason why Congress would have made state commission decisions reviewable *only* in federal court at the approval stage, as Section 252(e)(4) indisputably provides, but *only* in state court at the enforcement stage. The creation of such a peculiar scheme of judicial review, which could only complicate the effective implementation of the 1996 Act, should not lightly be attributed to Congress. See, *e.g.*, *Clinton* v. *City of New York*, 524 U.S. 417, 438 (1998) (recognizing that federal statutes, including jurisdictional ones, should be construed to avoid absurd results that Congress could not have intended).

Finally, nothing in Section 252(e)(6) divests the district courts of the jurisdiction that they otherwise possess under 28 U.S.C. 1331 over "all civil actions arising under the * * * laws * * * of the United States." Accordingly, a district court has jurisdiction under Section 1331 to adjudicate claims, such as Verizon's claims in this case, that a state commission has construed and enforced an interconnection agreement in a manner that is contrary to, and thus is preempted by, controlling federal law. See, *e.g.*, *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983).

II. SECTION 252(e)(6) VALIDLY CONDITIONS A STATE'S EXERCISE OF FEDERAL REGULATORY AUTHORITY UNDER THE 1996 ACT ON THE STATE'S CONSENT TO FEDERAL COURT REVIEW

1. Contrary to MPSC's assertion (Supp. Br. 9), this Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), casts no doubt on whether Congress may condition a grant of authority to a State, which the State would not otherwise possess, on the State's consent to suit with respect to its exercise of that authority. In *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), the Court upheld just such a condition. And, in *College Savings Bank*, the Court recognized the continuing validity of *Petty*. See 527 U.S. at 686-687.

MPSC contends (Supp. Br. 10) that "Congress lacks the constitutional authority, pursuant to the Commerce Clause," to impose a condition, such as a waiver of immunity, on the offer of a federal benefit to the States. No such restriction is suggested in *College Savings Bank*'s discussion of permissible "constructive waivers" enacted by Congress "in the exercise of its Article I powers." 527 U.S. at 686. Presumably, if such a restriction were to exist, the Court would have alluded to it in that case, which involved legislation enacted under the Commerce Clause. Nor is there any reason to distinguish in this regard between statutes enacted under Congress's commerce power and statutes enacted under its other Article I powers, such as the interstate compact power in *Petty* and the spending power in *South Dakota* v. *Dole*, 483 U.S. 203 (1987). So long as Congress requires a waiver of immunity only as a

condition of receiving a benefit, which the States are under no compulsion to accept, see *College Savings Bank*, 527 U.S. at 687, the particular Article I power under which Congress acts logically makes no difference.[2]

MPSC disputes (Supp. Br. 10-11) that the opportunity to regulate interconnection agreements under the 1996 Act is a "gift" or "gratuity" that may be conditioned on a waiver of immunity, arguing that "[p]rior to the 1996 Act, Maryland had sole authority over its local exchange market." It is irrelevant, however, what authority the States possessed before the 1996 Act, which "has taken the regulation of local telecommunications competition away from the States" to a significant extent. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999). The relevant question is whether "the state commissions' participation in the administration of the new *federal* regime," *ibid.*, is a benefit that Congress was free to withhold and the States were free to decline. The answer is clearly yes.

As to the first aspect of that question, this Court has recognized that "the commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities," or, as a "less intrusive" measure, to impose conditions on "continued state involvement in [the] pre-emptible area." *FERC* v. *Mississippi*, 456 U.S. 742, 764-765 (1982); see *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).

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[2] MPSC errs in categorically asserting (Supp. Br. 10) that "Congress is not permitted to do indirectly what it cannot do directly," for cases such as *Dole* recognize that Congress may induce action from the States, in return for the provision of a federal benefit, that Congress could not directly require. See *Dole*, 483 U.S. at 209-211; see also, *e.g.*, *FERC* v. *Mississippi*, 456 U.S. 742, 766 (1982).

As to the second aspect, the 1996 Act makes clear that States may, without penalty, elect not to regulate under the 1996 Act, see 47 U.S.C. 252(e)(5) and (6), and Virginia has, in fact, made that election, thereby refuting MPSC's assertion (Supp. Br. 11) that "participation by the States in the 1996[] Act['s] regulatory scheme was not voluntary." See U.S. Supp. Br. 16 n.9.

A State's choice whether to exercise regulatory authority under the 1996 Act is no less "voluntary" simply because, given its preexisting "interest" in "the provision of telecommunications services to the citizenry at competitive rates," the State prefers to arbitrate, approve, and enforce interconnection agreements rather than to leave those tasks to the FCC. MPSC Supp. Br. 11. As the Court observed in *Dole* when rejecting the argument that Congress's offer of a financial inducement to the States is necessarily coercive, "the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems." *Dole*, 483 U.S. at 211 (quoting *Charles C. Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937) (Cardozo, J.)). Moreover, MPSC's assertion (Supp. Br. 12) that a State is "forced" by the 1996 Act either to waive its immunity or to "los[e] the previously held power to regulate the local exchange market" is exaggerated. The 1996 Act leaves many traditional areas of local telecommunications regulation exclusively to the States.

MPSC argues that the regulation of interconnection agreements under the 1996 Act, like the interstate commercial activity in *College Savings Bank*, is "otherwise permissible activity" from which States cannot be excluded for failure to waive immunity. See 527 U.S. at 687. MPSC is mistaken. The opportunity to participate *as a regulator* in the administration of an Act of

Congress—an activity that did not exist before the enactment of the 1996 Act and that Congress could have assigned exclusively to the FCC—bears no resemblance to engaging *as a regulated entity* in a commercial activity together with private parties. Instead, much like the formation of the interstate compact in *Petty*, the regulation of interconnection agreements under the 1996 Act is conduct in which "States *cannot* [engage] * * * without first obtaining the express consent of Congress." *College Savs. Bank*, 527 U.S. at 686. As the Court recognized, "the granting of such consent is a gratuity," *ibid.*, which may be conditioned on a waiver of immunity.

2. MPSC contends (Supp. Br. 7-8) that, even if Congress could validly condition its offer to the States of regulatory authority under the 1996 Act on their waiver of immunity, Congress did not do so with sufficient clarity in Section 252(e)(6), which "says nothing about either a State or its utility commission or commissioners being parties." As the Court has observed, however, Congress's intent to require a waiver of immunity need not be stated in the "most express language," so long as the text "leave[s] no room for any other reasonable construction." *College Savs. Bank*, 527 U.S. at 678 (quoting *Edelman* v. *Jordan*, 415 U.S. 651, 673 (1974)); see, *e.g.*, *Petty*, 359 U.S. at 277-278, 281-282 (finding congressional requirement of waiver by implication from statutory language). That standard is satisfied here.

As noted, Section 252(e)(6), which is titled "[r]eview of state commission actions," provides that, "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court." The standard means for seek-

ing judicial review of the determinations of a government entity is a suit that names the entity or its officials as defendants. Section 252(e)(6) further provides for "judicial review of the [FCC's] actions" when it acts in the place of a state commission—and such review occurs in a proceeding under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, in which the FCC necessarily is a party. See U.S. Supp. Br. 17; see also *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 519 U.S. 248, 265 (1997) (observing that Federal Rule of Appellate Procedure 15(a), "the general rule that governs all appeals from administrative agencies to the courts of appeals," requires that "[i]n each case the agency must be named respondent"). Section 252(e)(6) can only reasonably be understood, in context, as authorizing suits against state commission in similar circumstances. MPSC concedes as much elsewhere (Supp. Br. 17), arguing that "Congress clearly intended for § 252(e)(6) actions to proceed ***against State commissions***."[3]

[3] In addition, MPSC contends (Supp. Br. 8-9) that Congress did not clearly provide for federal court review of state commission decisions construing and enforcing existing agreements, as distinguished from those approving or rejecting new agreements. As elsewhere explained, Section 252(e)(6), by its terms, encompasses decisions at both the approval stage and the enforcement stage. No warrant exists to read into Section 252(e)(6) the limitation urged by MPSC. See U.S. Supp. Br. 6-14; pp. 1-4, *supra*,

III. CONGRESS EVINCED NO INTENT TO PRECLUDE *EX PARTE YOUNG* REVIEW TO ASSURE THAT STATE COMMISSIONERS ENFORCE INTERCONNECTION AGREEMENTS IN ACCORDANCE WITH FEDERAL LAW

1. Relying on *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), MPSC contends (Supp. Br. 19) that a suit against state commissioners under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), "will frustrate Congress' clear intent that [the] 1996 Act provides the ***exclusive*** remedies against the state commissions." As previously explained, however, nothing in Section 252(e)(6) or any other provision of the 1996 Act suggests any intent by Congress to foreclose *Ex parte Young* review. See U.S. Supp. Br. 20-22.

MPSC errs in perceiving any resemblance between the "elaborate," "intricate," "detailed" remedial scheme in *Seminole Tribe*, 517 U.S. at 50, 74—which persuaded the Court that Congress sought to foreclose any other resort to federal court to secure state officials' compliance with the Indian Gaming Regulatory Act (IGRA)—and the single sentence in Section 252(e)(6) authorizing judicial review of state commission determinations under the 1996 Act. Section 252(e)(6) does not, as MPSC suggests (Supp. Br. 17), state or even imply that judicial review is available only against the state commission as an entity, and not against the individual state commissioners. Indeed, MPSC elsewhere acknowledges (*id.* at 7) that Section 252(e)(6) does not, by its terms, distinguish between state commissions and state commissioners as defendants. Nor does Section 252(e)(6), as MPSC also suggests (*id.* at 18-19), restrict the sorts of relief that a district court may order if it finds that a state commission has acted

contrary to the 1996 Act. See *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992) ("[W]e presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise."); cf. *Seminole Tribe*, 517 U.S. at 74-75 (describing statutory restrictions on relief available in district court).

2. MPSC mistakenly asserts (Supp. Br. 15-16) that *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), precludes *Ex parte Young* review so long as state officials act "within their jurisdiction," even if they act contrary to federal law. *Larson* was not even a suit against a state official; it was a suit against an official of the United States, in his official capacity, alleging a tortious act by his agency. See *id.* at 692. In holding that the United States' sovereign immunity barred such a suit, the Court rejected the theory that federal officials necessarily act outside their federal authority when they commit common-law torts. See *id.* at 692-695. But the Court nonetheless acknowledged the principle of *Ex parte Young* that treats state officials as acting outside their state authority when they violate federal law. See *id.* at 690-691. That principle derives from the Supremacy Clause of the Constitution. See, *e.g.*, *Green* v. *Mansour*, 474 U.S. 64, 68 (1985) ("[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."). Neither the Supremacy Clause nor any other federal constitutional or statutory restraint on the federal official's conduct was implicated in *Larson*.

MPSC also argues (Supp. Br. 16-17) that *Ex parte Young* suits cannot be used to challenge the action of a

state commission "as a body." That argument is refuted by this Court's numerous decisions, extending over more than a century, in cases seeking to enjoin the individual members of a state commission from enforcing a rate order or other collective action of the commission that was claimed to be repugnant to federal law. See U.S. Supp. Br. 23 (citing illustrative cases); see also *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341, 344 n.4 (1951) (rejecting state public service commissioners' challenge to federal judicial review of commission's orders "in view of the many cases prior to and following *Ex parte Young* in which this Court has granted such relief over the same objection"). MPSC does not even acknowledge those cases, much less attempt to distinguish them.

3. Finally, MPSC contends (Supp. Br. 19) that this case does not involve "an ongoing violation of *federal* law," as required by the *Ex parte Young* doctrine, because "[d]isputes regarding the interpretation of interconnection agreements are analyzed using ***State*** contract law principles." Clearly, however, many issues that arise in the interpretation of interconnection agreements are governed by federal law. For example, the interpretation of an arbitrated provision—which was imposed by the state commission to "meet the requirements" of Section 251 or 252, see 47 U.S.C. 252(c)(1) and (e)(2)(B) —presents a question of federal law. Moreover, to the extent that a negotiated provision tracks those requirements, its interpretation also requires an analysis of federal law. And, in any event, even if a state commission were understood to apply only state contract law in interpreting a negotiated provision, a party may nonetheless claim that the interpretation adopted by the state commission is preempted by the 1996 Act or the FCC's rules. Such

claims that state officials have acted in contravention of controlling federal law are cognizable in an *Ex parte Young* action. Verizon has asserted such claims in this case. See Verizon Supp. Br. 10-11.[4]

IV STATE COMMISSIONS OR COMMISSIONERS ARE NOT INDISPENSABLE PARTIES TO SUITS CHALLENGING THEIR ORDERS UNDER THE 1996 ACT

This case does not squarely present the question whether, if state commissions and commissioners are held to be immune from federal court suits to review their orders under the 1996 Act, such suits may proceed in their absence. See Verizon Pet. App. 15a (declining to resolve the question); cf. MPSC Supp. Br. 21-24 (addressing the question). In the United States' view, however, such suits may proceed without the state commission or commissioners, provided that sufficient adversity exists between the private parties to create an Article III case or controversy.[5]

State commissions and commissioners are not indispensable parties to such suits, within the meaning of Rule 19(b) of the Federal Rules of Civil Procedure, because a judgment rendered in their absence would not significantly prejudice them or the private parties. As MPSC recognizes (Supp. Br. 22-23), a state commission has no pecuniary or comparable interest in such a suit, but merely an interest in advancing state

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[4] The availability of *Ex parte Young* review in a case such as this one does not, of course, turn on whether the plaintiff will ultimately be successful in establishing a violation of federal law. See *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997) ("An *allegation* of an ongoing violation of federal law * * * is ordinarily sufficient.") (emphasis added).

[5] Such adversity may not always exist. See U.S. Supp. Br. 18.

policy—an interest that is attenuated where the only question is whether the commission has acted consistently with federal law in implementing a federal regulatory program. The state commission need not be a party to the suit for its policies to be considered. Its order can speak for itself. In addition, the party who prevailed before the state commission can be expected to defend the order vigorously, and the state commission, if it wishes to do so, may participate as an amicus curiae or intervene.

As for the private parties, if the federal court holds that the state commission's order violates federal law, the court may enjoin those parties from attempting to enforce it. Such an injunction, although not operating directly against the state commission or commissioners, would ordinarily provide adequate relief. Cf. *Williams* v. *Fanning*, 332 U.S. 490, 494 (1947) (Postmaster General was not an indispensable party where "[t]he decree in order to be effective need not require [him] to do a single thing"). In the unlikely event that a state commission continued to demand compliance with its order, notwithstanding a supervening federal court judgment that the order is contrary to federal law, no question should exist as to the availability of *Ex parte Young* relief against its commissioners.

* * * * *

For the foregoing reasons, as well as those stated in the United States' earlier briefs in this case and in *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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